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MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**  
*See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.*

**FILED BY CLERK**

**OCT 19 2011**

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

PINAL COUNTY SHERIFF'S	)	
DEPARTMENT,	)	2 CA-CV 2011-0013
Plaintiff/Appellee,	)	DEPARTMENT A
	)	
v.	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
CARDEST JAMES,	)	Rule 28, Rules of Civil
	)	Appellate Procedure
Defendant/Appellant.	)	
_____	)	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CV201000456

Honorable William J. O'Neil, Judge

VACATED AND REMANDED

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ECKERSTROM, Presiding Judge.

¶1 Appellant Cardest James appeals from the superior court’s order reversing the decision of the Pinal County Employee Merit System Commission and reinstating the discipline imposed on James by appellee the Pinal County Sheriff’s Office (PCSO). He argues the superior court “improperly substituted its judgment for that of the Commission” and applied the wrong standard of review in reversing the Commission’s decision. For the following reasons, we vacate the superior court’s order and remand the case to the Commission for further proceedings.

### **Factual and Procedural Background**

¶2 PCSO terminated James’s employment as a deputy in May 2009, alleging ten charges as the basis for termination. James appealed his termination to the Commission, and a three-day evidentiary hearing was held. In its January 2010 order, the Commission concluded that PCSO had not presented sufficient facts or evidence to support the charges against James and thus, had “failed to meet its burden that the disciplinary measure applied to [James] by [PCSO] was taken for reasonable cause, and was neither arbitrary nor capricious.” It therefore ordered that James be reinstated to his former position with back pay.

¶3 PCSO filed a complaint in superior court for review of the Commission’s decision, arguing it was “not supported by substantial evidence, is contrary to law, and invalid.” After the parties submitted briefs and the superior court held oral argument, the court reversed the Commission’s decision and upheld PCSO’s termination of James. James has filed this appeal of the superior court’s decision. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-913.

## Discussion

¶4 James argues the superior court “improperly substituted its judgment for that of the Merit Commission” because the Commission correctly decided that PCSO had failed to satisfy its burden of proof. A party dissatisfied with the Commission’s decision may first seek review by the superior court pursuant to the Administrative Review Act. *See* A.R.S. §§ 12-901 through 12-914; *Guertin v. Pinal Cnty.*, 178 Ariz. 610, 611, 875 P.2d 843, 844 (App. 1994). The superior court’s review is limited to determining whether the Commission’s action “is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion.” § 12-910(E); *accord Carlson v. Ariz. State Pers. Bd.*, 214 Ariz. 426, ¶ 13, 153 P.3d 1055, 1059 (App. 2007). The superior court does not weigh the evidence, nor does it decide whether the record supports the employer’s version of the facts, but rather, whether the record supports the Commission’s factual findings. *See Pima Cnty. v. Pima Cnty. Merit Sys. Comm’n (“Mathis”)*, 189 Ariz. 566, 569, 944 P.2d 508, 511 (App. 1997); *Carondelet Health Servs. v. AHCCCS*, 182 Ariz. 502, 504, 897 P.2d 1388, 1390 (App. 1995). And, on appeal from the superior court, we apply the same standards of review. *Mathis*, 189 Ariz. at 569, 944 P.2d at 511; *Havasu Heights Ranch and Dev. Corp. v. Desert Valley Wood Prods., Inc.*, 167 Ariz. 383, 386-87, 807 P.2d 1119, 1122-23 (App. 1990). Accordingly, this court independently reviews the Commission’s decision under § 12-910(E), *see Golob v. Ariz. Med. Bd.*, 217 Ariz. 505, ¶ 11, 176 P.3d 703, 707 (App. 2008), and we must affirm that decision unless it is not based on substantial evidence, or in reaching the decision the

Commission “acted illegally, arbitrarily, capriciously, or abused its discretion.” *Carondelet Health Servs.*, 182 Ariz. at 504, 897 P.2d at 1390; *accord* § 12-910(E).

¶5 Merit commissions must follow local rules when deciding employees’ appeals from disciplinary actions. *See Maricopa Cnty. Sheriff’s Office v. Maricopa Cnty. Emp. Merit Sys. Comm’n (“Juarez”)*, 211 Ariz. 219, ¶¶ 9-11, 119 P.3d 1022, 1024 (2005). Rule 13.4(Q), Pinal County Uniform Merit System Rules, provides that if “a majority of the Commission determines that the appealed action was arbitrary or taken without reasonable cause, the action shall be revoked or modified. Otherwise the action shall be affirmed.” And, Rule 9(A)(1), (B), Pinal County Employee Merit System Commission Rules of Procedure on Appeals, provides that the burden is on the employer to show “by a preponderance of the evidence that the disciplinary measure applied . . . was taken for reasonable cause, and was neither arbitrary nor capricious.”

¶6 The employer lacks “reasonable cause” when the evidence does not “justify a reasonable person in the belief that the acts charged are true.” *Juarez*, 211 Ariz. 219, ¶ 14, 119 P.3d at 1025 (interpreting Maricopa County Merit Commission Rule with identical language to Pinal County rule). “If the Merit Commission determines the evidence does not support the charge giving rise to the action taken, it must revoke the order because the action taken was arbitrary or taken without reasonable cause.” *Mathis*, 189 Ariz. at 568, 944 P.2d at 510. In explaining the Commission’s role in relation to the employer, our supreme court has described the Commission as a “neutral fact-finder . . . not bound by the facts asserted by the employer, but . . . required to independently find the facts warranting discipline.” *Pima Cnty. v. Pima Cnty. Law Enforcement Merit Sys.*

*Council* (“Harvey”), 211 Ariz. 224, ¶ 21, 119 P.3d 1027, 1031 (2005); *see also Juarez*, 211 Ariz. 219, ¶ 13, 119 P.3d at 1025 (noting “Commission’s initial task is to create a record and to ascertain the facts” by preponderance of evidence); *Mathis*, 189 Ariz. at 568, 944 P.2d at 510 (merit commission is “quasi-judicial body” that determines witness credibility, resolves conflicts in evidence, and weighs sufficiency of evidence presented).

¶7 In turn, when determining whether substantial evidence supports the Commission’s findings, we do not reweigh the evidence. *Taylor v. Ariz. Law Enforcement Merit Sys. Council*, 152 Ariz. 200, 202, 731 P.2d 95, 97 (App. 1986); *accord Petras v. Ariz. State Liquor Bd.*, 129 Ariz. 449, 451, 631 P.2d 1107, 1109 (App. 1981). Rather, if the administrative record supports two inconsistent factual conclusions, then there is substantial evidence supporting a decision that adopts either conclusion. *Webster v. State Bd. of Regents*, 123 Ariz. 363, 365-66, 599 P.2d 816, 818-19 (App. 1979); *accord Mathis*, 189 Ariz. at 570, 944 P.2d at 512. In other words, we may not substitute our judgment for that of the Commission, even in situations where we would have made a different decision had we been the original decision maker. *See Blake v. City of Phx.*, 157 Ariz. 93, 96, 754 P.2d 1368, 1371 (App. 1988); *accord Mueller v. City of Phx.*, 102 Ariz. 575, 581, 435 P.2d 472, 478 (1967). “Neither this court nor the superior court may substitute its judgment for that of the agency on factual questions or matters of agency expertise,” but “[w]e apply our independent judgment . . . to questions of law, including questions of statutory interpretation and constitutional claims.” *Carlson*, 214 Ariz. 426, ¶ 13, 153 P.3d at 1059, *quoting Webb v. Ariz. Bd. of Med. Exam’rs*, 202 Ariz. 555, ¶ 7, 48 P.3d 505, 507 (App. 2002).

## Failure to Maintain Quality Assurance Standards: Charges 1 and 2

¶8 In the summer of 2007, Sergeant Robert Monashefsky, James's supervisor, assigned James responsibility for the maintenance of two of PCSO's Intoxilyzer devices, which use a person's breath to measure his or her blood-alcohol level. While working for another police department, James had been certified by the Department of Public Safety (DPS) as a quality assurance specialist (QAS) for Intoxilyzer machines. At the time James was assigned the duty, Pinal County did not have its own policy regarding maintenance of the Intoxilyzer machines, but rather followed the standard DPS policy taught in the QAS certification training.

¶9 Between August 2007 and June 2008, James did not perform four required thirty-one-day calibration checks and performed only one required ninety-day test on each of the Intoxilyzer machines.<sup>1</sup> Because the checks were not performed consistently, the state could not rely on the evidence gained from those machines, and, as a result, at least seven cases of driving under the influence of an intoxicant (DUI) were dismissed. In all, seventy-six DUI cases relied on evidence from one of those two machines during the relevant time period and were at risk for dismissal.

¶10 PCSO alleged that, by "fail[ing] to properly follow up and complete the required testing of the breath testing device," James had not "demonstrate[d] sufficient competency or efficiency to perform assigned duties and responsibilities." In its view,

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<sup>1</sup>A different deputy completed another of the required ninety-day tests on one of the machines during this time period.

his actions had resulted in the dismissal of several DUI cases, which was “conduct . . . that . . . would tend to bring discredit to the County.”

¶11 James maintained that the scope of his responsibilities in conducting the required quality assurance testing had not been articulated fully by his supervisor and criticized the department’s lack of a written policy for assigning quality assurance duties. Sergeant Monashefsky conceded that his instructions could have been more specific.<sup>2</sup> However, James ultimately never secured clarification about the precise scope of his responsibilities for the machines, notwithstanding his apparent knowledge from his DPS certification that the admissibility of Intoxilyzer results from each machine depended on the completion of all of the necessary quality assurance tasks.

¶12 The Commission found that PCSO “did not have a written policy regarding the assignment or maintenance of QAS records.” And thus, PCSO had not shown “that discipline based on these Charges was warranted or taken for reasonable cause where no written policy was violated and [James]’s duties concerning the QAS records were not clearly defined.”

¶13 However, the Commission received undisputed evidence that PCSO supervisors routinely assign duties to their deputies verbally, and there is no requirement that duties be assigned in writing. To the extent the Commission found that discipline

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<sup>2</sup>Although James acknowledged he had taken “primary responsibility” as the QAS, he later stated he believed he was acting only as the backup for Monashefsky. Monashefsky stated he may not have made it clear to James when he first assigned the task. However, in a November 2007 electronic mail message from Monashefsky to James, Monashefsky stated that he had completely passed the QAS duties on to James.

was unwarranted because there was no written policy in place, the Commission exceeded the scope of its authority. It is not the Commission's duty to assess the wisdom of PCSO's policies regarding the assignment of duties. *See Juarez*, 211 Ariz. 219, ¶¶ 17, 22, 119 P.3d at 1026, 1027 (requiring commission to defer to sheriff's determination about discipline that fell "within standards and policies" of sheriff's department). Rather, it must determine whether, by a preponderance of the evidence presented, there were sufficient facts to justify a reasonable belief that the charged acts were true. *See Juarez*, 211 Ariz. 219, ¶¶ 13-14, 119 P.3d at 1025.

¶14 Here, PCSO alleged that James did not "demonstrate sufficient competency or efficiency to perform assigned duties and responsibilities" and that James's alleged neglectful performance of his assigned duties "would tend to bring discredit to the County." Because the Commission's findings suggest that the lack of a written policy as to QAS assignments was pivotal to its ultimate conclusion that discipline was unwarranted based on these charges, we remand those charges for redetermination in conformity with the appropriate scope of the Commission's authority.

#### Arming a Civilian Observer and Exposing Him to Danger: Charges 3 and 4

¶15 During a shift in which James was accompanied on patrol by a civilian observer, PCSO dispatch officers broadcast a call over the radio that shots had been fired in a neighborhood. James advised the dispatch center that he would respond to the call.<sup>3</sup>

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<sup>3</sup>Within one minute, Deputy Brad Buysse also responded that he would go to the scene, and James knew Buysse was on his way. Although Buysse attempted to contact James by cellular telephone and by radio to coordinate a response, James neither answered nor attempted to contact Buysse himself.

James arrived in the neighborhood and was told to contact the dispatch center for more details. James was then informed he was responding to a potential domestic violence situation involving PCSO's Public Information Officer, Vanessa W.; her boyfriend was suicidal; and he had left the house with a shotgun and a handgun. Because the situation involved PCSO's Public Information Officer, the dispatch operators instructed James to call in to get the information rather than broadcast it over the general radio channel.

¶16 When James received the exact address from dispatch, his vehicle was passing the residence, and he immediately parked it in front. James testified that, because he had not known when his backup would arrive, he had decided to give a department-issued shotgun to his civilian observer, Bryan M., and use him as "backup." Bryan M. was a corrections officer who James knew was trained in firearm use. Vanessa answered the door and informed James and Bryan that her boyfriend might be in the backyard and that he had left the shotgun by the back door. James and Bryan went into the backyard and found the boyfriend crouched in a corner with a gun in his hand. At one point, suspecting the boyfriend was going to shoot either himself or James, James shot the suspect in the leg to disarm him. Officers arrived on the scene shortly thereafter, and the first officer to arrive initially was unclear as to the identity of Bryan and why he was holding a shotgun.

¶17 Following an investigation into the incident, PCSO charged James with violating two policies relating to civilian observers by his actions that night. Specifically, James was charged with violating PCSO's policies that "[n]o firearms or other weapon may be carried by any observer," and "[t]he Deputy is responsible for the safety of the

observer.” The Commission found PCSO had not met its burden of proof on these charges and found that, in light of the failed dispatch communication, James had acted reasonably in arming Bryan and using him as emergency backup pursuant to PCSO’s deviation policy. That policy allows a deputy to “deviate from established PCSO policies and procedures when it is in the obvious best interests of PCSO.”<sup>4</sup> Pinal County Sheriff’s Office Policy and Procedure Manual § 1.4.2.1.1.

¶18 Although the evidence supporting this finding is conflicting, several witnesses testified James’s actions that night were justified under the deviation policy. Accordingly, there is some evidence supporting the finding, and we generally would affirm it. *See Mueller*, 102 Ariz. at 581-82, 435 P.2d at 478-79 (affirming administrative decision supported by “some evidence”); *Webster*, 123 Ariz. at 365-66, 599 P.2d at 818-19 (administrative decision adopting one of two inconsistent factual conclusions supported by record is based on substantial evidence).

¶19 However, the Commission also based its decision in part on the erroneous application of a criminal statute, A.R.S. § 13-2403, which makes it a misdemeanor to refuse to assist an officer with a reasonable request for assistance. James argues the statute “supports and further demonstrates the importance of an officer’s ability to deviate from general policies and to elicit help from civilians when the need arises.” However, he acknowledges the statute has no relevance to whether he acted reasonably under

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<sup>4</sup>The policy further provides, *inter alia*, that “[t]he necessity to deviate from established policy should rarely occur,” and “[e]mployees must be able to justify any deviation from policy.”

PCSO policy when he chose to elicit such help from a civilian observer, armed the observer, and introduced him into a potentially dangerous situation. In context, the Commission's finding suggests it placed significant weight on a statute with no relevance to the disciplinary charges. Thus, to the extent the Commission based its finding that James had deviated properly from PCSO policy on the application of this statute, it erred in its application of the law and abused its discretion. On remand, the Commission should consider the evidence only in light of whether James violated PCSO policies and whether James appropriately deviated from those policies, not based on whether our state may seek criminal sanctions against those civilians who disregard the reasonable instructions of officers.

Off-Duty Conduct Bringing Discredit to the County: Charges 8, 9, and 10

¶20 While being investigated for the QAS violations and the shooting incident, James went to a day care facility one evening and confronted the owner, Marlene M., about her decision to terminate the care of his friend's children. James, a "big guy," was dressed in clothing that said "felony" and "sinner" on it, and asked for her day care license number and told her he was a member of the sheriff's department. Marlene called the sheriff's department to report the interaction with James, and two officers responded. One of the officers testified Marlene "seem[ed] okay" by the time they responded, but she told him that she felt James had been trying to scare and harass her. She later told Sergeant Phil LeBlanc during his internal affairs investigation of James that James had been loud and threatening during the encounter but asserted that she did not want James to lose his job as a result of her complaint.

¶21 James testified to the Commission that he did not raise his voice to Marlene and had identified himself as an officer only to reassure her that he posed no threat. However, Marlene was sufficiently alarmed to both call her daughter-in-law and report the incident to the sheriff's department. Marlene's daughter-in-law, who had overheard parts of the encounter over the telephone, had been sufficiently concerned to return to the day care center.

¶22 Based on this incident, PCSO alleged James "ha[d] engaged in conduct . . . off duty that is of such a nature that it would tend to bring discredit to the County" or to himself,<sup>5</sup> by "confront[ing] . . . a member of the public over an entirely personal matter while identifying himself as a Sheriff's Deputy." The Commission determined that insufficient evidence supported the charges related to the incident because PCSO "did not present witness testimony to support these charges and Deputy A[vil]ez testified that the reporting civilian did not appear to be upset when he arrived to the scene."

¶23 The first part of this finding is clearly erroneous. PCSO presented witness testimony. Sergeant LeBlanc, who had interviewed Marlene about the incident, testified at the hearing. Moreover, to the extent the Commission's findings suggest that live testimony from every witness including Marlene was required, that finding also was erroneous. *See* Pinal County Uniform Merit System Rule 13.4(I)(1) ("The hearing shall be informal and technical rules of evidence shall not apply to the proceedings . . .").

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<sup>5</sup>Charge 10 also alleged James had violated Pinal County Employee Uniform Merit Rule 12.1.C.25, which prohibits "[a]ny other improper conduct or performance of such severity as to constitute cause for disciplinary action."

Such errors are especially troubling in the context of the Commission’s broader conclusion that PCSO failed to “present sufficient facts or evidence” to support the charges.

¶24 And, the Commission’s only other finding—that Marlene was no longer upset when the investigating officers arrived on the scene—does not address squarely the PCSO allegation that James had identified himself as a sheriff’s deputy in the context of a personal matter. Indeed, James did not dispute that he had encountered Marlene over a personal matter and asserted that he was a sheriff’s deputy in that context. On remand, the Commission should consider all of the evidence presented and, based on those facts it finds credible, determine both whether the PCSO allegations were accurate and whether James’s actions tended to bring discredit to himself or his employer.

Repeated Infractions: Charges 6 and 7

¶25 Based on the totality of the charges against him, PCSO alleged James “ha[d] repeatedly failed to conform to standards set for his position” and “ha[d] engaged in a course of conduct marked by repeated infraction of PCSO policies and procedures,” in violation of two of PCSO’s policies. The Commission found that PCSO had not sustained its burden on these charges because it had failed to prove the specific charges, as set forth above. However, because the Commission will have to reconsider its findings under the appropriate standards as to each charge, it necessarily will need to reconsider these global charges in light of its new findings.<sup>6</sup>

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<sup>6</sup>PCSO does not argue on appeal that the Commission erred by finding Charge 5 unsupported by the evidence. Thus, we do not address that charge.

## Disposition

¶26 Because the Commission based its decision on several erroneous considerations, we decline to speculate whether the Commission would have reached the same conclusion had it assessed the evidence solely under the appropriate criteria.<sup>7</sup> Therefore, we vacate the superior court's decision overturning the Commission's action and remand the case for further proceedings consistent with this decision.<sup>8</sup> James has requested his attorney fees and costs on appeal pursuant to A.R.S. §§ 12-341.01 and 38-1004(C). But James has neither specified which subsection of § 12-341.01 applies to this case nor provided any argument explaining why he is entitled to an award of fees and costs. Moreover, both § 12-341.01(A) and § 38-1004(C) require James to have prevailed on appeal to be entitled to an award of attorney fees and costs. Because we have remanded the case to the Commission for redetermination, James does not qualify as a prevailing party. We deny his request.

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge

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<sup>7</sup>We also note that several commissioners made statements appearing as if they were not considering whether PCSO had proven James violated policy but as if they believed the punishment simply was inappropriate. That reason would be legally incorrect unless they found the discipline imposed was not within the range of acceptable punishments, "was different from that imposed on similarly situated employees," or was so "unreasonably disproportionate to the offense as to be arbitrary or without reasonable cause." *Juarez*, 211 Ariz. 219, ¶¶ 16, 22, 119 P.3d at 1025-26, 1027.

<sup>8</sup>At oral argument, both parties suggested this court should either affirm or reverse the superior court's ruling without remanding the case to the Commission. However, it is the province of the Commission as fact-finder, and not this court, to determine the credibility of witnesses, reconcile conflicting evidence, and weigh the sufficiency of the evidence presented. *See Mathis*, 189 Ariz. at 568-69, 944 P.2d at 510-11.

CONCURRING:

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Judge

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge